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could be charged with a misdemeanor and be entitled to a jury trial, but it does not appear that a driver with this kind of record necessarily has shown a wilful or negligent disregard of the law. Moreover, neither a heavy fine nor jail would normally be imposed upon the second citation, so that the misdemeanor charge and jury guaranty would seem unnecessary as a practical matter in such a case.

Also it may be questioned whether criminal classification and sanctions for a fourth infraction would serve a useful purpose. Without making a fourth infraction a misdemeanor, a third or subsequent conviction for an infraction within a year would authorize imposition of a \$250 fine or a 90-day license suspension, well above the punishment usually imposed. Furthermore, a fourth or subsequent moving violation could result in revocation of a driver's license by the Department of Motor Vehicles,<sup>78</sup> subjecting a person who continues driving after his license is revoked to a misdemeanor charge, carrying a maximum penalty of \$500 fine and six months in jail upon a first conviction and double that upon a second conviction within seven years.<sup>79</sup>

Further, classifying the fourth infraction as a misdemeanor probably would reduce to some extent the relief otherwise offered by an infractions system for court congestion.

For these reasons it does not appear that a fourth infraction within 12 months should be classified as a misdemeanor.

#### *New York Law on Traffic Infractions*

New York is the only state which has designated traffic offenses as infractions and declared them not to be crimes. While it is not proposed that New York's infractions law be copied in California, it is useful to examine its provisions.

The violation of any provision of the Vehicle and Traffic Law, or of any law, ordinance, order, rule, or regulation regulating traffic which is not declared by the Vehicle and Traffic Law or other law of the state to be a misdemeanor or felony is a traffic infraction and is not a crime.<sup>80</sup> For procedural purposes, traffic infractions are treated as misdemeanors,<sup>81</sup> except that no jury trial is allowed<sup>82</sup> and no information need be filed when a fine is paid through a traffic violations bureau or when an information is waived.<sup>83</sup> Unless waived, an accused is entitled to a written information clearly stating the exact offense with which he is charged,<sup>84</sup> although it need not be stated with the same exactness as an information charging a misdemeanor.<sup>85</sup>

The defendant has a right to be arraigned and to be informed as to the effect of a plea of guilty.<sup>86</sup> The statutory warning must be given, whether the violation be an infraction, misdemeanor or a felony.<sup>87</sup> The code, however, relieves the court of the duty of informing the defendant

<sup>78</sup> Veh. Code §§ 13359, 12809, 12810.

<sup>79</sup> Veh. Code § 14601.

<sup>80</sup> N.Y. Vehicle and Traffic Law § 155; *People v. Malmud* (1957) 164 N.Y.S.2d 204.

<sup>81</sup> *People v. Karnow* (1953) 123 N.Y.S.2d 53; *People v. Wilson* (1957) 168 N.Y.S.2d 391;

*People v. Nagell* (1960) 206 N.Y.S.2d 654.

<sup>82</sup> § 155, *supra* note 80.

<sup>83</sup> *People v. Szymanski* (1959) 188 N.Y.S.2d 707.

<sup>84</sup> *People v. Bell* (1914) 148 N.Y.S. 753.

<sup>85</sup> *People v. Pier* (1953) 121 N.Y.S.2d 342; *People v. Osborn* (1958) 175 N.Y.S.2d 705.

<sup>86</sup> *People v. Mortice* (1957) 167 N.Y.S.2d 512; *DeLynn v. MacDuff* (1953) 305 N.Y. 501;

*McKinney's Code of Criminal Procedure* § 335-a.

<sup>87</sup> *People v. Duell* (1955) 145 N.Y.S.2d 690.

as to the effect of a plea of guilty where a sufficient statement of the effect is printed on the ticket or summons.<sup>88</sup>

Among the acts or omissions constituting traffic infractions under the Vehicle and Traffic Law are those pertaining to speeding, disobeying signs and signals, violating rights of way, improper turning, passing, parking violations, improper operation of bicycles and play vehicles, and pedestrians' rights and duties.<sup>89</sup> Operating a motor vehicle while one's ability to operate such motor vehicle is impaired by the consumption of alcohol is an infraction, whereas reckless driving and operating a motor vehicle while intoxicated are misdemeanors.<sup>90</sup>

The purpose of the legislature in denominating a traffic law violation as an infraction was to prevent the offender from being adjudged and treated as a criminal.<sup>91</sup> The Vehicle and Traffic Law, however, permits arrest without a warrant in the case of a traffic infraction, which is deemed a crime for such purpose.<sup>92</sup> This is in contrast to the lack of such police power in the case of other petty offenses, except vagrancy, fortune telling and breach of the peace.<sup>93</sup> The majority of procedural safeguards afforded a criminal are available to the offender, however, except that he is triable summarily,<sup>94</sup> and as recently held by the New York Court of Appeals, a defendant on a traffic infraction need not be advised of his right to counsel and has no right to an assignment of counsel.<sup>95</sup>

The penalties provided for most traffic infractions are a maximum of \$50 or 15 days in jail for a first offense, \$100 or 45 days in jail for a second offense within 18 months, and \$250 or 90 days in jail for a third or subsequent offense within 18 months of the first, or in each instance by both such fine and imprisonment.<sup>96</sup> For violations of the basic speed law the possible penalty is double that above for other infractions.<sup>97</sup>

### Disabilities

The New York law provides: "A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment, and shall not affect or impair the credibility as a witness, or otherwise, of any person convicted thereof."<sup>98</sup>

<sup>88</sup> McKinney's Code of Criminal Procedure § 335-a.

<sup>89</sup> N.Y. Vehicle and Traffic Law, Title VII, §§ 1100-1236.

<sup>90</sup> N.Y. Vehicle and Traffic Law § 1192. See *Columbia v. Colts* (1930) 282 U.S. 63.

<sup>91</sup> *Squadrito v. Griebisch* (1956) 154 N.Y.S.2d 37.

<sup>92</sup> N.Y. Vehicle and Traffic Law § 155. This section was amended in 1959 to provide for arrest without a warrant upon an infraction as held in the *Squadrito* case. It would appear that a general statutory provision making all provisions of law relating to misdemeanors applicable to infractions would include authority to arrest, search, seize and the like.

<sup>93</sup> *People v. Philips* (1940) 284 N.Y. 235; Code of Crim. Proc. §§ 894 and 900.

<sup>94</sup> New York Constitution, Art. VI, § 18; Vehicle and Traffic Law, § 155; Conservation Law, §§ 388 and 678; *Cooley v. Wilder* (1932) 255 N.Y. Supp. 218; *McQuage v. City of New York* (1954) 136 N.Y.S.2d 111; *People v. Bevilacqua* (1958) 170 N.Y.S.2d 423, reversed on other grounds in 182 N.Y.S.2d 18. See *supra* note 38, and text for U.S. Supreme Court and state decisions upholding summary proceedings in petty offenses.

<sup>95</sup> *People v. Letterio* and *People v. Kohler* (1965) 16 N.Y.2d 307 and 266 N.Y.S.2d 368, citing article 18-B of the Code of Criminal Procedure (L. 1965, ch. 378), expressly excepting those charged with traffic infractions from the class included under the new statutory scheme for providing counsel to indigent defendants, and citing *McDonald v. Moore* (5th Cir., 1965) 353 F.2d 106, to the effect that Federal Courts recognize the possibility of a rule limiting the implementation of the right to counsel in the prosecution of petty offenses.

<sup>96</sup> N.Y. Vehicle and Traffic Law, § 1800.

<sup>97</sup> § 1801-a, *supra* note 96.

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<sup>99</sup> *Supra*, p. 34.

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The Model Penal Code similarly provides that conviction of a “violation” shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.<sup>99</sup>

Proposals for reclassifying minor traffic violations as infractions in California would provide as penalties a fine, license suspension or attendance at a school for traffic violators.<sup>100</sup> The only other “disabilities or legal disadvantages” resulting from a conviction for a traffic infraction would be those specifically provided, e.g., the authority of the Department of Motor Vehicles to refuse to renew the driver’s license of a negligent operator.<sup>101</sup>

The New York provision concerning the credibility of a witness suggests the possibility that in the absence of such a provision in its law a witness in New York could be impeached upon proof of conviction of a traffic infraction. A witness in California would need no such protection, however, for the only conviction serving to impeach a witness in this state is conviction of a felony.<sup>102</sup> Thus, for domestic law purposes, the Model Penal Code and New York provisions do not appear to be required in California, where the only disabilities flowing from conviction of a traffic infraction would be those specifically provided therefor or from its character as a traffic violation rather than as a criminal offense. For example, a taxi driver, truck driver or one otherwise employed as a chauffeur might be refused a necessary permit and thereby be ineligible for employment as a result of convictions of violations of rules of the road indicating negligent driving habits, rather than on the basis that such violations may be public offenses, and there is no suggestion that this effect would be modified by reclassifying certain violations as infractions.

While the requirements of domestic law are met without the Model Penal Code provision, it is possible that a noncriminal classification and treatment for lesser traffic violations in California might not apply in the same way outside the state. A conflict of laws question could arise when another jurisdiction, considering imposition of a disability on one convicted of a public offense, has before it convictions of traffic infractions in California.<sup>103</sup> For example, only New York has expressly provided that a “traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment.”<sup>104</sup> Elsewhere, a traffic violation may be classified as some kind of public offense, whether designated a misdemeanor, petty offense or otherwise, and the consequences of conviction may vary from state to state. “Perhaps no branch of the law is in a more formative or unsettled condition, or presents questions of a more complex nature, than conflict of laws.”<sup>105</sup>

It would be difficult, however, to justify a provision similar to that included in the Model Penal Code solely on the basis of its effect in other jurisdictions. If a court in another state looked to the law of

<sup>99</sup> *Supra*, p. 34.

<sup>100</sup> *Supra*, p. 31.

<sup>101</sup> Veh. Code §§ 12809 and 12810.

<sup>102</sup> *Fortner v. Bruhn* (1963) 217 Cal.App.2d 184, 190; Code Civ. Proc. § 2051, now contained in Evid. Code § 788.

<sup>103</sup> *Conviction as Disqualification* (1948) 175 A.L.R. 784; *Witnesses—Conviction in Another Jurisdiction* (1917A) L.R.A. 1138.

<sup>104</sup> *Supra*, note 98.

<sup>105</sup> 11 Cal.Jur.2d, *Conflict of Laws* § 3 at 39.

California it would find that a California traffic infraction would not be a crime and no disability or legal disadvantage would accrue from a conviction except such as is expressly provided by law, i.e., loss of the driving privilege. If the state chose to apply its own law regarding the classification of the offense and the effect of a conviction for such an offense, the addition of the Model Penal Code provision to the Council's proposal would have no effect.

Moreover, if such language were added California courts might give it an unintended meaning. For example, a court might hold that it was added to prevent the Department of Motor Vehicles from taking administrative action based on a conviction for a traffic infraction.

For these reasons it does not appear that such a provision should be included in any California proposal.

### Infractions Procedure

The traffic infractions system discussed herein contemplates that, in general, misdemeanor procedures would apply but there would be no right to a jury trial.<sup>106</sup> In addition to the elimination of jury trials, however, there are other procedural modifications that should be considered in an effort to provide a simplified but effective system for such cases.

For most persons it is not economically feasible to make several visits to court to be heard on a traffic ticket or to hire counsel in such a case. Any system for traffic infractions should, wherever possible, incorporate simplified procedures consistent with the needs in such cases. For example, it may be possible to modify procedures on bail, arraignment, plea and sentencing, as well as to relax rules of evidence, to improve the opportunity to be heard in infractions cases.

Among the procedural modifications that have been considered are:

#### 1. Right to Counsel

The Sixth Amendment of the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This provision has been construed "to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."<sup>107</sup> In *Gideon v. Wainwright*<sup>108</sup> this requirement was held to apply to the states also under the due process clause of the Fourteenth Amendment.

A basic question not yet clearly resolved by the United States Supreme Court is whether the Fourteenth Amendment requires a state to appoint counsel to defend an accused charged with a minor offense. The *Gideon* case involved a felony, but the court spoke of indigents "charged with crime" rather than indigents charged with felonies.<sup>109</sup> Mr. Justice Black in the court opinion in *Gideon* wrote: "... reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire

a lawyer, cannot be assu- him. This seems to us state and federal, quite-lish machinery to try-ecute are everywhere d-est in an orderly socie-with crime, few indee-get to prepare and pre-yers to prosecute and-to defend are the stro-lawyers in criminal co-one charged with crim-and essential to fair t-the very beginning, ou-laid great emphasis on-to assure fair trials-fendant stands equal-ized if the poor man-without a lawyer to a-conviction of a felony-eral times of the rigl-life or liberty is at st-these cases involved f-Black's opinions cover-demarcation between-Mr. Justice Clark in-teenth Amendment r-'liberty' just as for-ally be a difference ir-supposed difference ir-concurring in the deci-matically impose an-but Mr. Justice Dou- "... rights protecte-of the Fourteenth An-the Bill of Rights gu-

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<sup>106</sup> *Supra*, p. 31.

<sup>107</sup> *Gideon v. Wainwright* (1963) 372 U.S. 335, 340, citing *Johnson v. Zerbst* (1937) 304 U.S. 458; for a recent annotation on the subject, see *Accused's Right to Assistance of Counsel at or Prior to Arraignment* (1966) 5 A.L.R.3d 1269; see also *Annotation* references to *Miranda v. Arizona* (1966) 384 U.S. 436, 16 L.Ed.2d 694.

<sup>108</sup> Note 107, *supra*.

<sup>109</sup> 9 L.Ed. 2d Anno. 1260-1261; Anno. 93 A.L.R.2d 750-751; *Constitutional Guaranty of Right to Appear by Counsel as Applicable to Misdemeanor Case*, Anno., 42 A.L.R. 1157.

<sup>110</sup> *Gideon v. Wainwright*, *supra*.

<sup>111</sup> *Johnson v. Zerbst*, *supra*.

<sup>112</sup> *Gideon v. Wainwright*, *supra*.

<sup>113</sup> *Id.* at 352.

<sup>114</sup> *Id.* at 347.

<sup>115</sup> *Supra* note 109, citing *Illinois* (1948) 333 U.

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a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>110</sup> In an earlier opinion involving a conviction of a felony in a federal court Mr. Justice Black spoke several times of the right to counsel applying in behalf of one whose life or liberty is at stake in a criminal proceeding.<sup>111</sup> While both of these cases involved felony prosecutions, the language in Mr. Justice Black's opinions covers all criminal prosecutions without any line of demarcation between serious and minor offenses. As pointed out by Mr. Justice Clark in his concurring opinion in *Gideon*, "The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for deprivation of 'life', and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved."<sup>112</sup> Mr. Justice Harlan, concurring in the decision, expressed his view that *Gideon* did not automatically impose an entire body of federal laws on the states,<sup>113</sup> but Mr. Justice Douglas, in a concurring opinion disagreed, saying, ". . . rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees."<sup>114</sup>

On the scope of the right to counsel in the federal courts opinions of the United States Supreme Court before *Gideon* contained language indicating a line of demarcation between serious and nonserious charges.<sup>115</sup> Mr. Justice Douglas, speaking for the four dissenting justices in *Bute v. Illinois* said, "A man who suffers up to 20 years in prison as a penalty is undergoing one of the most serious of all punishments. It might not be nonsense to draw the *Betts v. Brady* line somewhere between that case and the case on one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter." The test, he thought, was the need for

<sup>110</sup> *Gideon v. Wainwright*, *supra* note 107 at 344.

<sup>111</sup> *Johnson v. Zerbst*, *supra* note 107.

<sup>112</sup> *Gideon v. Wainwright*, *supra* note 107 at 349.

<sup>113</sup> *Id.* at 352.

<sup>114</sup> *Id.* at 347.

<sup>115</sup> *Supra* note 109, citing *Uveges v. Pennsylvania* (1948) 335 U.S. 437 and *Bute v. Illinois* (1948) 333 U.S. 640.

counsel "... measured by the *nature* of the *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law."<sup>116</sup>

In *Evans v. Rives*,<sup>117</sup> which involved a prosecution on a federal misdemeanor charge, the Court of Appeals for the District of Columbia held that failure to advise the defendant on arraignment that he had the right to the assistance of counsel violated his constitutional right to counsel, and refused to accept the suggestion that the right applies only to serious offenses. On that point the court said: "No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."<sup>118</sup>

Quoting the above language, the Court of Appeals for the Fifth Circuit in *Harvey v. State of Mississippi* recently applied this rule to a state misdemeanor prosecution.<sup>119</sup> The defendant had been sentenced by a Justice of the Peace to pay a \$500 fine and serve 90 days in jail on the charge of illegal possession of whiskey. On the question of the application of the *Evans v. Rives* rule to state prosecutions the court said: "While the rule as thus stated has never been expressly extended to misdemeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in *Gideon v. Wainwright*. Be this as it may, the reasoning in *Evans* along with other recent right-to-counsel decisions persuades us that we should apply that rule in the present case."<sup>120</sup>

The same court followed *Harvey* in a subsequent case involving a state misdemeanor prosecution in which the appellant had entered pleas of guilty without being advised of her right to counsel on charges of illegal possession and sale of whiskey and was sentenced to pay a fine of \$250 or serve six months in jail on each charge.<sup>121</sup> While holding that the defendant had a right to counsel in the case before it, the court stated: "It seems unlikely that a person in a municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or the municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state. If the Constitution requires that counsel be provided in such cases it would

<sup>116</sup> *Supra* note 115 at 682.

<sup>117</sup> 126 F.2d 633 (1942).

<sup>118</sup> *Id.* at 638. See also Rule 44(a) of the Federal Rules of Criminal Procedure as amended by the Supreme Court effective July 1, 1966, which provides as follows: "44(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." The Advisory Committee Notes accompanying this revision of the rules commented with reference to Rule 44, "Like the original rule the amended rule provides a right to counsel which . . . extends to petty offenses to be tried in the district courts . . ." (*Proposed Rules of Criminal Procedure* (1966) 39 F.R.D. 168, 202.)

<sup>119</sup> 340 F.2d 263 (1965).

<sup>120</sup> *Id.* at 271.

<sup>121</sup> *McDonald v. Moore* (1965) 353 F.2d 106.

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<sup>122</sup> *Id.* at 108-09.

<sup>123</sup> *City of Tacoma v. State of Washington*

<sup>124</sup> *In re Garafano*

<sup>125</sup> *Fish v. State of Washington*

<sup>126</sup> *Tucker, The*

<sup>127</sup> *Ibid.*

<sup>128</sup> *People v. Le*

<sup>129</sup> *People v. Le*

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seem that in many urban areas there would be a requirement for more lawyers than could be made available. Even with the assistance of law students, whose services may be requested under some of the Criminal Justice plans, the demand might come near exceeding the supply."<sup>122</sup>

Recent state court decisions have been divided concerning the right to counsel in cases other than felonies. Some courts have held that the right to counsel applies to misdemeanors<sup>123</sup> and to "quasi-criminal offenses."<sup>124</sup> The Florida Supreme Court, however, has limited the *Gideon* doctrine to felonies and denied the right to counsel in misdemeanor cases.<sup>125</sup>

As noted by one writer, where the line will be drawn for application of the right to counsel awaits future determination.<sup>126</sup> "Must counsel," he asks, "be assigned to assist an indigent accused of a traffic offense, where the punishment can be fine or imprisonment? . . . It may be that the Supreme Court will refuse to draw a line between felonies, misdemeanors and other offenses."<sup>127</sup>

It should be noted that in all of the above cases, whether involving a felony, misdemeanor, petty offense or quasi-criminal proceeding the convicted defendant could be sentenced to imprisonment.

The New York Court of Appeals recently held that the right to counsel did not apply in behalf of one charged with a traffic infraction, even where imprisonment was imposed.<sup>128</sup> For seven speeding and three other "moving" violations one defendant had been sentenced to pay a fine of \$1,030, or in default of payment to serve 135 days in jail, plus 42 days' imprisonment, and another defendant had been sentenced to pay a fine of \$100, or in default of payment to serve 30 days in the workhouse, plus 10 days' imprisonment and six months' license suspension on a speeding violation.

New York is the only state which has designated traffic offenses as infractions and declared them not be crimes. In 1965 the New York Legislature further expressly excepted persons charged with traffic infractions from the class included under the new statutory scheme for providing counsel to indigent defendants.<sup>129</sup> The court accordingly found no statutory duty to inform a defendant charged with a traffic infraction of his right to counsel. While the majority opinion recognized that the right to counsel ordained by the Federal Constitution had been considered to extend to misdemeanor cases,<sup>130</sup> it cited *McDonald v. Moore*<sup>131</sup> for its recognition of the possibility of a rule limiting the implementation of the right to counsel in the prosecution of petty offenses.<sup>132</sup> In support of the decision the majority opinion said: "There are, historically, certain minor transgressions which admit of summary disposition. New York has long deemed traffic infractions as a form of misconduct distinguishable from more serious breaches of the law,

<sup>122</sup> *Id.* at 108-09.

<sup>123</sup> *City of Tacoma v. Heater* (Washington, 1966) 409 P.2d 867, 869. See also *Manning v. State of Maryland* (1965) 206 A.2d 563.

<sup>124</sup> *In re Garafone* (N.J. 1963) 193 A.2d 398, 405-06.

<sup>125</sup> *Fish v. State* (1964) 159 So.2d 866.

<sup>126</sup> *Tucker, The Supreme Court and the Indigent Defendant* (1964) 37 So. Cal. L. Rev. 151, 173-74.

<sup>127</sup> *Ibid.*

<sup>128</sup> *People v. Letterio and Kohler* (1965) 213 N.E.2d 670, 16 N.Y.2d 307, 266 N.Y.S.2d 368.

<sup>129</sup> *People v. Letterio and Kohler*, *supra* note 128, citing Article 18-B of the Code of Criminal Procedure (L. 1965, ch. 878).

<sup>130</sup> Citing *Harvey v. State of Mississippi*, *supra* note 119.

<sup>131</sup> *Supra* note 121.

<sup>132</sup> The *McDonald* opinion, however, pointed out that such a rule would be difficult to sustain on any legal ground. *Supra*, note 121 at 109.

or crimes (Penal Law, § 2; Vehicle and Traffic Law, § 155). While not controlling, we believe that this time-honored distinction supports our conclusion that a traffic court need but assure the defendant a fair forum in which to be heard. As a practical matter, the traffic court Judge often sits as prosecutor, defense counsel, and Judge. Neither this triune function, nor the failure of a traffic court Judge to advise the defendant that he may have counsel, is so unfair as to require the result urged by the dissenters."<sup>133</sup>

After pointing out that the Vehicle and Traffic Law expressly provides that "[a] traffic infraction is not a crime and the . . . punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment . . ." Judge Bergan in his concurring opinion said: "A traffic violation in New York carries a penalty, therefore, but it is not a criminal penalty even though the procedural forms of law followed in criminal courts are, as a matter of judicial convenience, also employed in traffic cases (Vehicle and Traffic Law, § 155). The penalty is something in the nature of a community sanction or civil penalty but it is not in any respect punishment for a crime. There may be a fine and, in extreme but very rare cases, a jail sentence, but these too are similar to certain civil compulsions which the law exerts.

"We should not, therefore, as a matter of consistence, apply to the noncriminal class of offense all the weight and the solemn constitutional procedural mechanisms that we have learned to apply to criminal cases. The distinctions that have been carefully spelled out by the Legislature in this class of offense render it unwise as a matter of policy to treat traffic offenders as we treat persons charged with crime."<sup>134</sup>

In a dissenting opinion Chief Judge Desmond called attention to a rule adopted by the Supreme Court of Massachusetts in 1964 requiring that a defendant be told about his right to counsel and assignment of counsel, whenever charged with any crime for which a sentence of imprisonment may be imposed.<sup>135</sup> In his view the possibility of imprisonment imposed under a criminal procedure was more meaningful than the statutory noncriminal designation in determining whether the defendant was entitled to the constitutional guaranty of the right to counsel.<sup>136</sup> Supporting his view is the position taken by the drafters of the Model Penal Code, that if, as in New York ". . . a sentence of imprisonment is authorized (as an immediate sanction upon conviction rather than merely to coerce the payment of a penalty) it is an inadmissible semantic manipulation to declare that the offense is not a crime."<sup>137</sup>

#### California

The California Constitution provides in Article 1, Section 13: "In criminal prosecutions in any court whatever, the party accused shall have the right . . . to appear and defend, in person and with counsel," and Article 1, Section 8, protects the right at the preliminary examination.<sup>138</sup> Supplementing the Constitution, statutes provide for advising

a defendant in a assignment of counsel compensation of a fender.<sup>140</sup>

The California constitutional right of proceedings is, in California equally guaranteed by the state or other inferior court collectively assignment of counsel pleas to five counts other Vehicle Code other cases had sentences of 180 a total of 900 days. The record contained waived his right do not specify the defendants of their fast rule will acceptment courts the collectively but affirmative showing defendant being a valid waiver, but somewhat less serious misdemeanor cases, adverted to ants of their right that the typically urgent problems is particularly to called upon to decide cases, vagrancies impairment of the however minor but of valid ways to constitutional right the court should the vast majority the judge's interests sufficiently ances in the first such defendant a of defending him Compliance with

<sup>133</sup> *Supra* note 128 at 672.

<sup>134</sup> *Supra* note 128 at 672-73.

<sup>135</sup> Citing 347 Mass. 809.

<sup>136</sup> *Supra* note 128 at 674 and 676.

<sup>137</sup> See *supra*, p. 34.

<sup>138</sup> See Witkin, *California Criminal Procedure* (1963) p. 354. For articles on the right to counsel in California, see Witkin at pp. 130-132, 347-385, and 631-34; 14 Cal.Jur. 2d, *Criminal Law*, §§ 146 et seq.; *Duty to Advise of Right to Counsel*, 3 A.L.R.2d 1003, 1033; *The Right to Counsel in Misdemeanor Cases* (1960) 48 Cal.L.Rev. 501-505.

<sup>139</sup> See Pen.Code §§ 6 3 A.L.R.2d 1003-

<sup>140</sup> Pen.Code § 987a, ( Atty. Gen. 33 (1

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Section 13: "In rty accused shall d with counsel," minary examina- vide for advising

a defendant in criminal prosecutions of his right to counsel and to assignment of counsel.<sup>139</sup> In addition, statutory provision is made for compensation of assigned counsel and representation by the public defender.<sup>140</sup>

The California Supreme Court has declared "that the fundamental constitutional right to the assistance of counsel at all stages of the proceedings is, in California at least, not limited to felony cases but is equally guaranteed to persons charged with misdemeanors in municipal or other inferior courts."<sup>141</sup> In that case (*In re Johnson*) the defendant had been one of a large number of defendants in the traffic court collectively advised by the judge of their right to counsel and to assignment of counsel. Without counsel the defendant entered guilty pleas to five counts of driving with a revoked license, plus a number of other Vehicle Code violations. After being required to wait until the other cases had been concluded he was sentenced to five consecutive sentences of 180 days on each count of driving with a revoked license, a total of 900 days, plus suspended sentences on the remaining counts. The record contained no declaration that the defendant had expressly waived his right to counsel. Emphasizing that the statutory provisions do not specify the precise manner in which courts are to apprise defendants of their right to counsel and pointing out that no hard and fast rule will accommodate the diverse problems facing the arraignment courts the court upheld the judge in his advising the defendants collectively but held that there was no valid waiver of the right, an affirmative showing of an intelligent and understanding waiver by the defendant being required. With respect to the showing required for a valid waiver, however, the court in its dictum indicated that "a somewhat less stringent rule might be constitutionally permissible in misdemeanor cases" than in felony cases, saying: "Practical considerations, adverted to earlier in discussing methods of informing defendants of their rights, loom still larger at this point. We must recognize that the typically crowded arraignment calendars of our courts pose urgent problems in the administration of justice in California. This is particularly true of those courts in large municipalities which are called upon to deal with an unending stream of traffic violations, drunk cases, vagrancies, and similar petty offenses. While there can be no impairment of the fundamental constitutional rights of any defendant, however minor his crime, in certain situations there may be a choice of valid ways to implement these rights. Where such is the case—and constitutional rights are respected—the convenience of the parties and the court should be given considerable weight. For example, probably the vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make personal appearances in the first place. To require the judge to orally examine each such defendant at length for the purpose of determining his capability of defending himself would seem to be an idle and time-wasting ritual. Compliance with the spirit of the constitutional mandate that an in-

<sup>139</sup> See Pen.Code §§ 686, 858, 858.5, 859, 859a, 859b, 860, 866.5, 987, 1018. See also *Anno*, 3 A.L.R.2d 1003-1033.

<sup>140</sup> Pen.Code § 987a, Gov.Code § 27706. See 47 Ops. Cal. Atty. Gen. 50 (1966), 43 Ops. Cal. Atty. Gen. 33 (1964), 36 Ops. Cal. Atty. Gen. 85 (1960).

<sup>141</sup> *In re Johnson* (1965) 62 Cal.2d 325, 329.

Articles on the right to  
1 631-34; 14 Cal.Jur.  
Counsel, 3 A.L.R.2d  
1960) 48 Cal.L.Rev.

telligent waiver of counsel must affirmatively appear in the record may be efficiently achieved in such cases in a variety of acceptable ways."<sup>142</sup>

The defendant in the *Johnson* case, however, was not one of the vast majority of citizens haled into court on traffic violations. The charges were serious; his case was specially held for sentencing after the others were completed and he was sentenced to two and one-half years in jail. The Supreme Court accordingly held that "In view of the multiplicity and potential seriousness of the charges the court should have made a reasonable effort, before accepting petitioner's pleas of guilty, to determine whether he understood his predicament and was capable of representing himself effectively at all stages of the proceedings."<sup>143</sup>

Subsequently in a very recent case involving a charge of driving 53 miles per hour in a 25 mile zone, a decision of the Court of Appeal apparently obliterated any legal distinction insofar as waiver of counsel is concerned between serious violations such as were involved in *Johnson* and the run-of-the-mill traffic cases. The court held: "Yet, even though the offense is a minor one, constitutional rights of a defendant may not be diminished or forgotten. The critical question here is whether respondent's conviction may be upheld where he has properly been told of his right to counsel, but the record is silent upon the question of waiver of that right. In *Carnley v. Cochran*, 369 U.S. 506, 516, the court declared that 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that the accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'

"Although most cases in which the courts have declined to presume a waiver of the right to counsel when the record is silent are felony cases involving serious crimes, the court in *Johnson* applied the rule of *Carnley v. Cochran* in a misdemeanor traffic case. It is true that *Johnson* may readily be distinguished from the instant case. Obviously the cumulative sentences totaling 900 days in jail imposed in *Johnson* are much more severe than the one day jail sentence given to respondent here. Nevertheless we hold that where, as here, loss of personal liberty may, and actually does, result upon conviction, even though the offense be classified as a mere misdemeanor, the record must affirmatively show that the accused was notified of the right to counsel and expressly waived that right."<sup>144</sup>

### Conclusion

The purpose of the right to counsel is to assure that no defendant in a criminal case shall be deprived of life or liberty without the aid of counsel unless the right is competently and intelligently waived. This purpose does not require the assignment of counsel under a system in which minor traffic violations are classified as noncriminal infractions that do not carry the sanction of jail. Many procedures necessary to protect the right to counsel in a criminal case may be dispensed with, including the requirements of cases such as *Miranda v. Arizona*<sup>145</sup> relating to when the right arises. While these procedures are appro-

priate in a criminal case involving no deprivation of liberty, there be no deprivation of the right to counsel in a traffic infraction case.<sup>146</sup>

### 2. Bail and Fines

The most common reason for the appearance of a defendant in court is for the appearance of a defendant in court. Article I, Section 6 of the California Constitution provides that a defendant may be released on bail, sureties, unless for good cause shown, or presumption great. Penal Code states: "The court or magistrate shall set bail upon bail."<sup>148</sup>

"The sole purpose of the appearance of the defendant in court is to ensure attendance of the defendant in court for the purpose of revenue to the state."

In traffic cases, the defendant's appearance.<sup>150</sup> For the purpose, with bail, forfeiture used to ensure appearance. As provided by the Penal Code, upon his written promise to appear, he may deposit bail in court and penalize the court and penalize the court and penalize the court further proceedings. This use of bail does not necessarily

<sup>148</sup> Such defendants v. written promise to appear. See Vehicle Code § 1268.1. Witkin, California Criminal Law, 2d ed. (1961) § 1268.1. Pen. Code §§ 1268.1, 1268.2.

<sup>149</sup> Sawyer v. Barbo, 129 Cal.App.2d 555 (1961) 55 Cal. App. 2d 555.

<sup>150</sup> Veh. Code § 40511. Cal. Traffic Law, 2d ed. (1961) § 40511.

<sup>151</sup> Witkin, *supra* note 149, declares the bail requirement is not necessary.

<sup>152</sup> Veh. Code § 4050. Veh. Code § 4051.

<sup>153</sup> Veh. Code § 4051. Veh. Code § 420.

<sup>154</sup> Veh. Code § 4051. Veh. Code § 4051.

<sup>155</sup> *Supra* notes 147-149. Forfeiture may be required in specified cases. See Vehicle Code § 40511 (1961) p. 43.

<sup>142</sup> *Id.* at 336.

<sup>143</sup> *Id.* at 337.

<sup>144</sup> Blake v. Municipal Court (1966) 242 A.C.A. 857, 861-62.

<sup>145</sup> *Supra* note 107.

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priate in a criminal case, they appear inappropriate for traffic ticket cases involving no threat to liberty. In order, however, to assure that there be no deprivation of liberty without the assistance of counsel except upon proper waiver, provision should be made for advice on the right to counsel and for assignment of counsel when a defendant on a traffic infraction has been arrested and not released as provided by law.<sup>146</sup>

## 2. Bail and Fines

The most common meaning of bail is the security, cash or bond given for the appearance of a prisoner.<sup>147</sup> The California Constitution in Article I, Section 6 provides: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, . . ." The Penal Code states: "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail."<sup>148</sup>

"The sole purpose of bail in criminal cases is to ensure the personal attendance of the defendant on the court at all times when his appearance may be lawfully required . . . There should be no suggestion of revenue to the government nor punishment to the surety."<sup>149</sup>

In traffic cases bail is also theoretically intended to insure court appearance.<sup>150</sup> For minor traffic violations, however, it serves a different purpose, with bail fixed in the amount intended as the fine,<sup>151</sup> and forfeiture used to dispose of the case without a court appearance.<sup>152</sup> As provided by the Vehicle Code, the arrested person may be released upon his written promise to appear in court or before a person authorized to receive a deposit of bail.<sup>153</sup> Thereafter, when he keeps his promise, he may deposit bail,<sup>154</sup> plus a sum to cover any required night court and penalty assessments.<sup>155</sup> Upon his failure to appear for arraignment the court may forfeit the entire amount and order that no further proceedings be held in the case.<sup>156</sup> It has been pointed out that this use of bail is inconsistent with its purpose in criminal cases and does not necessarily provide a final disposition.<sup>157</sup>

<sup>146</sup> Such defendants would include those who have been arrested and not released on their written promise and who have not posted bail or been released on their own recognizance. See Veh. Code §§ 40300-40311, Procedure on Arrests, §§ 40500-40517, Release Upon Promise to Appear; see also Pen. Code §§ 858, 858.5, 859.

<sup>147</sup> Witkin, California Criminal Procedure (1963) § 148.

<sup>148</sup> Pen. Code § 1268. The statutory provisions for bail in criminal cases are contained in Pen. Code §§ 1268-1317, and § 1458 makes the general provisions applicable to inferior courts.

<sup>149</sup> Sawyer v. Barbour (1956) 142 Cal.App.2d 827, 833; see also People v. Calvert (1954) 129 Cal.App.2d 693, 698; People v. Wilcox (1960) 53 Cal.2d 651, 656; In re Newbern (1961) 55 Cal.2d 500, 504; 7 Cal.Jur.2d, *Bail and Recognizance*, 538; Gustafson, *Bail in California* (1956) 44 Cal. L.Rev. 815.

<sup>150</sup> Veh. Code § 40511.

<sup>151</sup> Cal. Traffic Law Administration (1960) 12 Stan.L.Rev. 388.

<sup>152</sup> Witkin, *supra* note 147. Veh. Code § 40512 permits the magistrate in his discretion to declare the bail forfeited and order that no further proceedings be had in the case.

<sup>153</sup> Veh. Code § 40504.

<sup>154</sup> Veh. Code § 40510.

<sup>155</sup> Veh. Code §§ 42006, 42051.

<sup>156</sup> Veh. Code § 40512.

<sup>157</sup> *Supra* notes 147 and 151. Pen. Code §§ 1305-1307 provide that within 180 days a forfeiture may be set aside and bail reinstated. Veh. Code §§ 1803 and 13103, with specified exceptions, treat bail forfeitures as convictions for the administrative purposes of the Department of Motor Vehicles. For a criticism of this application of bail to traffic violations, see Economos, *Traffic Court Procedure and Application* (1961) p. 43.

In California the municipal and justice court judges in each county are required to adopt a schedule of bail for all misdemeanor offenses<sup>158</sup> and in an effort to promote uniformity in traffic cases the Judicial Council has adopted the Uniform Traffic Bail Schedule indicating the amount of bail and the offenses requiring a court appearance.<sup>159</sup> While the Uniform Bail Schedule is not mandatory and the counties can differ in specifying which offenses require a court appearance, which may be concluded by bail forfeiture and the amounts required as bail, most counties have adopted schedules in substantial conformity with the Judicial Council schedule.

Under the Model Rules Governing Procedure in Traffic Cases a motorist may appear at the traffic violations bureau to sign an "Appearance, Plea of Guilty and Waiver" form whereby he agrees to pay the prescribed penalty.<sup>160</sup> The Rules require that he first be informed of his right to stand trial, that his signature to a plea of guilty will have the same effect as a judgment of court, and that the record of conviction will be sent to the Department of Motor Vehicles. When the motorist signs the required form the violations clerk is authorized to accept payment of the fine. This procedure is provided for minor moving violations in which a court appearance is not required.<sup>161</sup>

With appropriate modification the above procedure could be included as part of a traffic infractions system in cases not requiring a court appearance. At the time a motorist receives a citation he could be informed in writing that he has the right to appear in court with or without an attorney, and that in cases not requiring court appearance he may plead "no contest" and pay the prescribed fine to a person authorized to receive a deposit of bail. He would also be informed as to the effect of a "no contest" plea.<sup>162</sup> A "no contest" plea would provoke less discussion with the traffic violations clerk than the guilty plea and would not be an admission of guilt which could be used as evidence in a civil action.<sup>163</sup>

In addition, provision could be made that the fine for a traffic infraction upon such plea would be in the amount fixed in a schedule of fines adopted by the municipal and justice court judges in each county. The schedule would not be binding in cases where the defendant must or wishes to appear in court. As with bail, a nonmandatory uniform fine schedule could be adopted by the Judicial Council to promote substantial uniformity in a manner consistent with local needs.

Such a system for payment of fines and bail, however, should be integrated with revised arraignment, plea and court appearance procedures for traffic infractions to provide a simplified system. In order to simplify arraignment procedures, at the time a person receives a traffic ticket he could be informed by written statement of his rights.

<sup>158</sup> Pen. Code § 1269b.

<sup>159</sup> Cal. Rules of Court, Rule 850.

<sup>160</sup> Rule 1:3-7. The Model Rules were drafted by the National Conference of Commissioners on Uniform State Laws and approved in 1957. See Economos, *Traffic Court Procedure and Administration*, Appendix B.

<sup>161</sup> *Ibid.*

<sup>162</sup> New York Code of Criminal Procedure § 335-a provides that printing the effect of a plea of guilty on a traffic citation in bold red type constitutes compliance with the code requirements that the defendant be so informed at the time of his arraignment. In receiving the plea at a clerk's window a rubber stamp could be used to stamp the plea and waiver with space for a signature directly on the court copy of the citation.

<sup>163</sup> See *The Effect of a Plea of Guilty or Forfeiture of Bail in Traffic Offenses* (1963) 14 Hastings L.J. 454.

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<sup>164</sup> Pen. Code § 1096; Jur.2d, *Evidence*,

<sup>165</sup> 20 Am.Jur., *Eviden* Code § 115.

<sup>166</sup> *Holt v. United State*

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<sup>169</sup> Veh. Code §§ 41102

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He could be further notified that he may enter his plea with the clerk either in person or, where feasible, by mail except where court appearance is required. Under an infractions system such provisions for arraignment, plea, bail and fines would eliminate the provision for continuance for plea, reduce the number of visits usually required of defendants who wish to appear in court and provide a final disposition for those who do not.

### 3. Burden of Proof

In a criminal case the burden of proof is on the prosecution to establish guilt beyond a reasonable doubt,<sup>164</sup> whereas in a civil case proof by a preponderance of the evidence is all that is required.<sup>165</sup> The reasons for the difference are that under our system of justice the law presumes innocence in all criminal prosecutions and in order to overcome the legal presumption the evidence must be clear and sufficiently strong to convince the trier of fact beyond a reasonable doubt that the defendant is guilty,<sup>166</sup> whereas "between man and man, where a loss might fall upon one or the other, it is right that the law should cast it upon him who is shown to have been the cause of the loss, by proof establishing reasonable probability of the fact."<sup>167</sup>

While prosecution for an infraction would not be prosecution for a crime, neither would it be litigation "between man and man." The prosecution would still be brought in the name of the state, the law relating to misdemeanors would provide the procedural framework for prosecuting infractions and penalties would still be imposed. Furthermore, the time required to conduct a trial would not be materially lessened, if at all, by such a change in the burden of proof and the chief effect would be to eliminate the presumption of innocence.<sup>168</sup>

Presumptions are now stated in the Vehicle Code whereby the prosecution can establish a prima facie case sufficient to overcome the presumption of innocence for parking and some speeding violations.<sup>169</sup> In most parking violation cases the driver is not present and it is difficult to establish his identity without the assistance of the presumption. Considering the probability that the owner usually drives his car or knows who does, the presumption is based on sound principles<sup>170</sup> and serves the goals of effective and convenient parking law enforcement. Similarly, where the Legislature has declared that no person shall drive faster than is reasonable and prudent<sup>171</sup> and has established standards of speed which it considers reasonable under certain conditions,<sup>172</sup> it is not unfair to place the burden on a defendant to show that his speed in excess of that standard was, never-

<sup>164</sup> Pen. Code § 1096; Evid. Code § 501; 48 Cal.Jur.2d, *Trial*, §§ 481-82, 486; 18 Cal. Jur.2d, *Evidence*, §§ 112-13; 20 Am. Jur., *Evidence*, § 1256.

<sup>165</sup> 20 Am.Jur., *Evidence*, §§ 1248 et seq.; 18 Cal.Jur.2d, *Evidence*, §§ 103-07, 110; Evid. Code § 115.

<sup>166</sup> *Holt v. United States* (1910) 218 U.S. 245.

<sup>167</sup> 20 Am.Jur., *supra* note 165 at 1100.

<sup>168</sup> Cf. Conway, *Is Criminal or Civil Procedure Proper for Enforcement of Traffic Laws?* (1959) Wis.L.Rev. 418. Conway points out that triers of fact do not necessarily make a precise distinction between preponderance of the evidence and proof beyond a reasonable doubt. While this may be true, nevertheless, the statement of this distinction in the law is based on valid principles under our legal system, and in close cases there is no question but that the trier of fact is supported by the knowledge that he can avoid a possible injustice upon what he deems to be a reasonable doubt.

<sup>169</sup> Veh. Code §§ 41102, 22351(b).

<sup>170</sup> 18 Cal.Jur.2d, *Evidence*, §§ 65 et seq.

<sup>171</sup> Veh. Code § 22350.

<sup>172</sup> Veh. Code §§ 22352 et seq.

theless, reasonable and prudent at the time, place and under the conditions then existing.<sup>173</sup>

It is interesting to note the position taken by the British Council of the Law Society in its recommendation for the establishment of a category of noncriminal offenses to be designated as "improper use of the road." The Council considered whether a diminished standard of proof should be required in such cases but determined that in general the criminal standard should apply. The Council, however, did recommend that "where evidence is adduced in a Traffic Court that a road incident has occurred involving injury or damage to a road user, or to a person or property on or adjoining a road, under circumstances where had ordinary care and skill been employed in the use of the road it was unlikely to have occurred, that should afford prima facie evidence of improper, unreasonable or imprudent use of the road against any person who appears to have been involved in such occurrence, whether as a driver, cyclist or pedestrian."<sup>174</sup>

#### 4. Presumption of Negligence

Under existing case law a presumption of negligence may arise from a violation of a statute, ordinance or administrative regulation, including violations of provisions of the Vehicle Code regulating the operation of motor vehicles.<sup>175</sup> The statute is held to prescribe what is proper conduct of a reasonable person in a particular situation and conduct falling below the standard is said to be negligence per se.<sup>176</sup>

A question has been raised as to whether the presumption of negligence would apply to traffic violations reclassified as noncriminal infractions. These doubts result from language in some cases that seems to indicate that the presumption applies only when the statute carries a criminal sanction.<sup>177</sup> It would appear, however, that the cases that include such a statement are the exception rather than the rule,<sup>178</sup> and the language may be interpreted as a reference to the facts of the particular case before the court rather than the enunciation of a general requirement for all cases.

In other cases the presumption has been invoked despite the lack of a criminal sanction for the violation.<sup>179</sup> Moreover, a number of cases not involving violations of the Penal or Vehicle Code or other clearly penal statutes or ordinances do not even discuss whether the statute involved provided a criminal sanction.<sup>180</sup> If a criminal sanction were a

<sup>173</sup> Veh. Code § 22351(b); *Speed Laws and Burden of Proof* (1963) 14 Hastings L.J. 451.

<sup>174</sup> Council of the Law Society, *Motoring Offenses* (June 1965) 7.

<sup>175</sup> *Alarid v. Vanier* (1958) 50 Cal.2d 617; 2 Witkin, *Summary of Cal. Law* (1960), *Torts*, §§ 230-232.

<sup>176</sup> Witkin, *supra* note 175 at § 230. However, liability is dependent upon a showing that there was a duty owed to persons in plaintiff's class; that the harm was the type which the statute was designed to prevent and that the violation was the proximate cause of the injury. Witkin, *supra* at §§ 234-235.

<sup>177</sup> E.g., *Richards v. Stanley* (1954) 43 Cal.2d 60, 62; *Tossman v. Newman* (1951) 37 Cal.2d 522, 525.

<sup>178</sup> Among the cases in which no such statement was made are *Alarid v. Vanier*, *supra* note 175; *Witt v. Jackson* (1961) 57 Cal.2d 57, 63; *Nunnolley v. Edgar Hotel* (1950) 36 Cal.2d 493; *Roddiscraft, Inc. v. Skelton Logging Co.* (1963) 212 Cal. App.2d 784, 804-5; *Cowan v. Bunce* (1963) 212 Cal.App.2d 48; *Williams v. Lambert* (1962) 201 Cal.App.2d 115, 118-19, and see cases cited in notes 179 and 180, *infra*.

<sup>179</sup> *Forbes v. Los Angeles Ry.* (1945) 69 Cal.App.2d 794, 796. See *Cary v. Los Angeles Ry.* (1910) 157 Cal. 599, 603-04. Cf. *Clinkscales v. Carver* (1943) 22 Cal.2d 72; *Hopper v. Bulaich* (1945) 27 Cal.2d 431.

<sup>180</sup> *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 416; *Harris v. Joffe* (1946) 28 Cal.2d 418; *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 792; *Mason v. Case* (1962) 220 Cal.App.2d 170.

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<sup>181</sup> Prosser, *Tort*

<sup>182</sup> *Rest., Torts*

<sup>183</sup> *Ibid.*; Prosser

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<sup>185</sup> *Id.* at 117.

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necessary element for application of the rule it would appear that when applying the presumption the court would discuss the penal nature of the statute.

Neither Prosser<sup>181</sup> nor the Restatement<sup>182</sup> makes the imposition of a criminal sanction a necessary element of the application of the presumption. What they say is that the fact that a statute is penal in character and carries a criminal sanction does not prevent it from also imposing civil liability.<sup>183</sup>

The California Law Revision Commission apparently is also of the view that no criminal sanction is or should be necessary to invoke the presumption of negligence.<sup>184</sup> The Commission is proposing an amendment to the Evidence Code that would codify the existing presumption and, consistent with its view of existing law, no criminal sanction would be required under the proposed legislation.<sup>185</sup> It seems clear that no criminal sanction is now required and the presumption would therefore continue to apply to those traffic violations that would be reclassified as infractions whether or not the legislation proposed by the Law Revision Commission is enacted.

<sup>181</sup> Prosser, Torts (2d ed. 1955) § 34.

<sup>182</sup> Rest., Torts 2d, §§ 286-287.

<sup>183</sup> *Ibid.*; Prosser, *supra*; see also Satterlee v. Orange Glenn School Dist. (1947) 29 Cal.2d 581, 594-95 (concurring opinion).

<sup>184</sup> 8 Cal. Law Revision Commission Rep., Rec. & Studies (1967) 109.

<sup>185</sup> *Id.* at 117.